**MESSRS. YONG & CO.**

**v.**

**WEE HOOD TECK DEVELOPMENT CORP. LTD. (1)**

FEDERAL COURT, KUCHING
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 176 OF 1983]
24 FEBRUARY 1984

***LEGAL PROFESSION:*** *Advocate & Solicitor - Contractual duty - Retainer - Whether retainer could be implied - Breach - Conflict of interest - Tortious liability - Duty not to injure - Knowledge of common officers - Whether could be imputed to other company - Another officer - Whether alter ego of companies fraudulent concealment - Whether appellants guilty - "Fraud" - Meaning of - Pleaded in reply - Effect - Financial loss - Whether claim in negligence appropriate.*

***CIVIL PROCEDURE:*** *Limitation - Whether action barred - Effect of plea of fraud in reply - Effect of claim against firm.*

In 1966, the appellants, a firm of advocates and solicitors in Kuching prepared and registered an agreement for the respondents, a finance corporation, relating to a loan to be made to one Penghulu Francis Umpau (the Purchaser) to enable him to buy two lots of land from a construction company (the Developers). As soon as the Developers had obtained the issue documents to the land, the Developers were to execute a memorandum of transfer, and simultaneously, the Purchaser was to execute a memorandum of charge in favour of the respondents. The respondent were then to secure for the Developers a discharge on the land in favour of Bian Chiang Bank Ltd. (B.C. Bank), who were to receive the moneys payable as creditors of the Developers. In December 1966, the respondents wrote to the appellants setting out the terms and conditions of the proposed loan. In July 1967, the certificates of title were registered, but the discharge of the land was not secured. In August 1967, the Developers executed a second charge on the land in favour of B.C. Bank to secure advances on overdraft facilities. The charge was prepared by the appellants and registered. In June 1968, B.C. Bank were paid in full and a discharge of charge obtained. The Developers executed first and second charges on the same lots to Hock Hua Bank (H.H. Bank) as a security for a loan. The discharge and the charges were prepared by the appellants. Only in September 1974, did the respondents come to know that H.H. Bank were the chargees of the land. On the Developers defaulting, the lots were sold in January 1979. The respondents were left with an unsecured creditor. They sued the appellants. Judgment was given for the respondents for loss of money lent, and damages. The appellants appealed.

**Held:**

**[1]** There was ample evidence for the Court to conclude that a retainer came into existence by implication and as amplified by the conduct of the parties. The retainer put into operation the normal terms of contractual relationship including in particular the duty of the appellants as solicitors to protect the interests of the respondents as their clients, in matters to which the retainer related, by all proper means.

**[2]** The appellants had failed to comply with their contractual duty to inform the respondents of the issue and registration of the documents of title to the land to enable them to secure the discharge of the Developers' charge with B.C. Bank. It is an incident of the contractual duty of a solicitor to consult his client on all questions of doubt and to keep his client informed to such an extent as may be necessary.

**[3]** The appellants had acted in favour of the Developers, whose instructions directly conflicted with those of the respondents and had failed in their duty towards the respondents. They were a solicitor for two different clients whose interests were directly in conflict and had acted at their own peril. The onus of showing that the conflicting interests did not prevent them from doing their duty to both clients rested firmly on the appellants. The practice of having a common solicitor although legitimate and recognised by the order governing non-contentious remuneration, has inherent dangers in it.

**[4]** The appellants had not only failed to perform their obligations under the contract with the required skill and care but were also liable in tort for their wrongful act of depriving the respondents from having security for the loan they had advanced by failing to execute a memorandum of charge. A solicitor owes a duty not to injure his client by failing to do that which he had undertaken to do and which his client had relied on him to do.

**[5]** Knowledge of B.C. Bank was not knowledge of the respondents.

(a) Though B.C. Bank and the respondents had common officers, the knowledge and information acquired by B.C. Bank could not be imputed to the respondents. Knowledge acquired by the officer of one company will not be imputed to the other company unless the common officer had some duty imposed upon him to communicate the knowledge to the other company and vice versa. Nor will it be imputed in certain other circumstances, including fraud.

(b) The evidence was insufficient to justify the notion that the chairman and managing director of the respondents, who was also the managing director of B.C. Bank, was the *alter ego* of both the companies and could have arranged for the discharge of the two lots.

**[6]** There was fraudulent concealment by the appellants of the respondents' right of action. The appellants not only neglected to notify the respondents of the charge of the land to H.H. Bank until five years later, but were also instrumental in placing the securities out of the reach of the respondents. "Fraud" in this case extends to equitable or constructive fraud, which covers conduct which, having regard to some special relationship between the two parties concerned, is unconscionable.

**[7]** The respondents were not affected adversely by the Limitation Ordinance (Sarawak).

(a) The respondents were well within time as provided by item 76 of the Schedule to the Limitation Ordinance, and were therefore not barred. Limitation must be imputed from the time the fraud first became known to the person injuriously affected by its, as provided by s. 18 of the Ordinance. (s. 17 of the Indian Limitation Act 1963 and s. 26 of the English Limitation Act 1939 distinguished).

(b) The allegation of concealed fraud was properly pleaded, though it was particularised not in the statement of claim but in the amended reply. Only the remedy sought (and not the claim) was based on concealed fraud and it was sufficient to give the particulars in the reply so as to bring the case within the statutory provision of s. 18.

(c) On the other hand, the appellants were not barred from seeking protection under s. 18 of the Ordinance. Each and every of the partners fell within the ambit of the word person in s. 18. The claim was directed against all the three partners and this was in line with O. 48A r. 5 of the RSC (O. 77 r. 4 of RHC, 1980). If the names of the parties are specified, the plaintiff is competent to sue a firm for damages on the ground of fraud.

**[8]** Although the claim was for purely financial loss, it was no bar to liability for negligence.

*[Appeal dismissed.]*

**Cases referred to:**
*Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp [1978] 3 All ER 571*
*Groom v. Crocker [1938] 2 All ER 394*
*Smith v. Mansel [1962] 3 All ER 857*
*Goody v. Baring [1956] 2 All ER 11*
*Moody v. Cox [1916-17] All ER 548*
*In re Hampshire Land Company [1896] 2 Ch 743*
*Gale v. Lewis 9 QB 730*
*In re David Payne & Co. Ltd. [1904] 2 Ch 608*
*Lennards Carrying Co. v. Asiatic Petrol Co. [1914-15] All ER 280*
*Nockton v. Ashburton [1914] AC 933 946*
*Kitchen v. R.A.F. Assocn. & Ors. [1958] 2 All ER 241*
*Beaman v. A.R.T.S. [1949] 1 All ER 465*
*Thomson & Co. v. Pattison Elder & Co [1895] 22 R 432*
*Ross v. Caunters (a firm) [1979] 3 All ER 580*

**Legislation referred to:**
Land Code (Cap 81) (Sarawak), s. 148(2)(c)
Limitation Ordinance (Cap 49) (Sarawak), s. 18
Limitation Act 1939 [UK], s. 26
Limitation Act 1908 [Ind], s. 18
Limitation Act 1963 [Ind], s. 17
Rules of the High Court 1980, O. 77 r. 4

**Other Sources referred to:**
*Halsbury's Laws of England,* 3rd Edn. Vol. 36 p. 96, para. 131
*B. B. Mitra on Limitation Act,* (*1963*) 17th Edn. p. 215

*For the appellants - Humphrey Ball (Goh Leng Chua with him)*
*For the respondents - T.O. Thomas (Mohamed Asfar Nassar with him)*

**JUDGMENT**

**Syed Agil Barakbah FJ:**

This is an appeal against the decision of Mohd. Yusoff J in the High Court, Kuching, delivered on 7 June 1983 giving judgment for the respondents/plaintiffs for loss of money lent and awarding damages in the sum of RM136,898.12 made up of RM66,900 being principal sum lent plus interest at O.8% per mensem as from 30 September 1977, interest on RM66,900 at O.8% per mensem from 1 October 1977, and from date of judgment to date of settlement and costs.

The appellants are a firm of Advocates and Solicitors having their registered office in Kuching and the respondents are a finance corporation having their registered office in the same town.

The respondents' claim in the Court below was for damages for loss and expenses caused by the negligence and breach of contract of the appellants as the respondents' solicitors/ advocates in failing to act in accordance with the assurance given by the appellants to the respondents in a letter dated 15 August 1966 (AB12).

***Facts***

It is common ground that during the latter part of 1966, Penghulu Francis Umpau (the Purchaser) wanted to build a dwelling house and decided to buy two lots of land Nos. 1244 and 1248 Block 10 Kuching Town Land District (the said land) from M/s. Ong Construction Company (the Developers). The respondents agreed to lend him a sum of RM70,000 for the purpose on condition that the said land would be charged to them. At the respondents' request the appellants prepared an agreement relating to the proposed loan in which the respondents were referred to as the Financier, the Developers and the Purchaser were parties. The agreement was executed on 25 July 1966 and contained *inter alia* the following express terms:

> 2. The Developers shall build on the said land a dwelling house according to the drawing and plan prepared by the Purchaser...
>
> 3. The price of the said land and the completed dwelling house shall be RM62,000, payment of which shall be in accordance with the Schedule of Payment as hereinafter stated.
>
> 4. The Financier shall lend the Purchaser a sum of RM70,000 (Dollars Seventy thousand only) of which a sum of RM62,000 shall be assigned by the Purchaser to the Developers and the Financier shall release the same to the Developers' bankers the Bian Chiang Bank Ltd. from time to time according to the said Schedule of Payment. The said loan shall bear an interest of 0.8% per mensem and repayable by the Purchaser within 20 years that is to say on or before 25 July 1986.
>
> 5. As soon as the Developers shall have obtained the issue documents of title to the said land the Developers shall execute a memorandum of transfer of the said land to the Purchaser and simultaneous therewith the Purchaser shall execute a memorandum of charge on the said land in favour of the Financier as security for the repayment of the said loan of RM70,000 and for the said interest thereon. For bringing into effect of the above, the Financier shall secure for the Developers a discharge of charge created by the Developers in favour of Bian Chiang Bank Ltd. Provided that the moneys payable under the Schedule of Payment shall be paid to the said Bian Chiang Bank Ltd. as creditors of the Developers.

Thereafter the appellants had the agreement registered in the Registrar-General Registry at Kuching on 15 August 1966 and wrote to the respondents enclosing a registered copy of the same. The letter and the agreement are the documents referred to at the trial and are therefore of vital importance in deciding the central issue involved. The letter (AB12) states as follows:

**Loan to Penghulu Francis Umpau**
**Re: Agreement dated 25 July 1966**

> We enclose herewith a copy of agreement duly registered for your file. According to the agreement a sum of RM10,000 is payable to Messrs. Bian Chiang Bank Ltd. by you to the credit of Messrs. Ong Construction Co. and this sum shall constitute as an advance of the loan of RM70,000 to the Penghulu.
>
> As soon as the issue document of title is ready we will prepare a memorandum of transfer to be signed by Messrs. Ong Tiaw Kok and Ong Tiaw Sian in favour of the Penghulu and a memorandum of charge to be executed by the Penghulu in your favour.
>
> Yours faithfully,
> Yong & Co.

On 22 December 1966 as a result of a telephone inquiry by the senior partner of the appellants Datuk Stephen Yong to the respondents' operations manager for clarification of the terms and conditions of the proposed loan to enable them to prepare a charge in favour of the respondents, a letter was written by the latter setting out the required terms and conditions. The letter reads as follows:

**Lot 1244 & 1248**
**Block 10 K.T.L.D.**
**Penghulu Francis Umpau**

Dear Sir,

Reference our telephone conversation (Yong/Shim) of this morning, the following are the terms and conditions of the housing loan to Penghulu Francis Umpau:

| | | | |
|---|---|---|---|
| (a) | Amount of loan | ... | RM70,000 |
| (b) | Period of loan | ... | 20 years from 25 July 1966 |
| (c) | Rate of interest | ... | 0.8% per mensem |
| (d) | Titles | ... | to be charged to the Corporation, together with caveat |
| (e) | Monthly repayment | ... | not less than RM200 per month |
| (f) | Insurance | ... | building to be insured against fire; Insurance to be effected through the Corporation. |
| (g) | Other terms and conditions | ... | similar to that used by Borneo Housing Development Ltd. as conditions regards maintenance of building, entry by Chargee for inspection, postal address, payment of rates etc. but redemption of charge will be according to s. 145 (2) of the Land Code 1957 |

I hope the above clarifies.

Yours faithfully,
For WEE HOOD TECK DEVELOPMENT
CORPORATION LIMITED

Sgd.
Operations Manager.

The appellants did not take any further steps in relation to AB12 because the certificates of title in respect of the said land had not been issued. It was also not possible to secure the discharge of the charge with Bian Chiang Bank (B.C. Bank). On 20 July 1967 the certificates of title were registered. However the discharge of the said land was not secured in compliance with Clause 5 of the agreement. Instead on 25 August 1967 the Developers executed a second charge in favour of B.C. Bank to secure advances of RM440,000 as overdraft facilities. The charge was prepared by the appellants and the common seal of the Bank was affixed in the presence of PW1 the Bank's managing director and PW6 the Bank's secretary. This charge was registered on 14 September 1967 and further encumbered the said land.

About 12 days on 26 September 1967 B.C. Bank through their solicitors Thomas & Co. gave notice to the Developers demanding payment of the balance of money still unpaid and threatening legal action. On 8 February 1968 Thomas & Co. filed Originating Summons No. K2 of 1968 for an order of sale of 77 lots including the said land involved in the charges under s. 148(2)(c) of the Land Code (Cap. 81) Sarawak.

On 26 June 1968 the Developers paid the B.C. Bank's claim in full. The memorandum of discharge of charge given by B.C. Bank was signed by PW1 and PW6. It was prepared by the appellants. The discharge was made possible because the Developers executed a charge of the same lots including the said land to Hock Hua Bank (H.H. Bank) for the sum of RM150,000. The memorandum of charge was prepared by the appellants on 26 June 1968. On 14 January 1969, a second charge was executed by the Developers in favour of H.H. Bank for the sum of RM70,000. Again the memorandum of charge was prepared by the appellants.

On 19 July 1971 Ibrahim & Co. acting on behalf of the Purchaser and the respondents wrote to the Developers demanding the execution of the memorandum of transfer of the said land to the Purchaser. Since the demand was not complied with after some negotiations on 14 April 1974 both the Purchaser and the respondents filed a writ in the High Court Kuching *vide* Civil Suit No. K52 of 1974 against the Developers' partners Ong Tiaw Kok and Ong Tiaw Sian for specific performance of the agreement and for damages in lieu of or in addition thereto. It was only after some protracted correspondence that on 30 November 1974 Ong Tiaw Sian of the Developers informed the respondents through Thomas & Co. that H.H. Bank was the chargee of the said land. That was followed on 13 December 1975 by a letter from the appellants enclosing copy of a letter from H.H. Bank dated 9 December 1975 addressed to the appellants who appeared to have written to them on 1 December 1975 confirming the two charges and the amount thereof still outstanding and due from the Developers. They subsequently defaulted under the charges resulting in the sale by auction of the lots including the said land to a third party at the instance of H.H. Bank on 6 January 1979.

We have to trace the evidence stated above in its proper perspective as showing the sequence of events and the manner in which the two parties and the Developers became involved in what ought to be a straightforward land and housing loan transaction but which was rendered complicated. We realise the difficulty that the learned Judge had to face in arriving at his conclusions and we appreciate that he has prepared and written a comprehensive and detailed judgment. Bearing these in mind we have to tread carefully to consider the evidence and the points raised on appeal, the arguments proferred including the authorities cited by both Counsel for the appellants and the respondents, the former challenging the Judge's conclusions and the latter supporting them. The amount claimed and adjudged may not be large but the findings of the learned Judge involved fraudulent concealment by negligence and breach of duty on the part of a firm of advocates and solicitors which obviously affect their reputation in the light of the seriousness of the allegations. Perhaps the appellants had put their finger in more than one pie and found it difficult if not impossible to strike a proper balance in treating their clients without preferring one to the detriment of the other because they should be fully aware of the conflicts of interest and the risks involved in being a common solicitor for more than one client.

The respondents contended that as a result, they found themselves to be an unsecured creditor with no means of enforcing their claim against the Purchaser who had no means to pay the debt. They expected the appellants to act as their solicitors to carry out the undertakings as stated in AB12 with reasonable skill, care and diligence and at the same time to protect their interests in connection with the said loan having regard to the special relationship between them as solicitors and clients. Further, it was upon that belief the respondents gave the loan in five progressive payments in compliance with the agreement.

The cause of action relied on was:

(a) negligence and breach of contract of the appellants as their solicitors;

(b) that the respondents did not discover (a) above until within 3 years next before the commencement of this action and

(c) that the existence of such negligence and breach of duty was concealed by fraud of the appellants until within such 3 years.

The particulars mentioned *inter alia* reliance by the respondents on s. 18 of the Limitation Ordinance (Cap. 49) confined to the meaning of the word "fraud" mentioned therein.

In their pleadings the appellants denied the allegations and raised triable issues which were dealt with by the learned Judge.

***Retainer***

The main question was whether a contract came into being between the parties whereby the appellants undertook to prepare the memorandum of charge and have it duly executed in favour of the respondents. In other words, whether there was a retainer of the appellants as solicitor for the respondents. In his judgment the learned Judge drew a distinction between a retainer to prepare an agreement and a retainer to prepare memorandum of charge on the ground that the former did not clearly establish that the retainer came into existence upon its execution. However, he expressed the view that para. 2 of AB12 written subsequent to the agreement should be read with Clause 5 of the agreement provided that the appellants were obliged by the terms of the retainer to prepare the memorandum of charge as envisaged by Clause 5. AB12 in his opinion could be evidence of subsequent conduct showing a course of dealings which might give rise to legal obligations. He took into consideration PW1's reliance on the letter in the belief that his interests were protected when he paid out the agreed sums in accordance with the terms and conditions of the agreement. He concluded that AB23 reinforced his view that the appellants were retained to act for the respondents on the basis of the clear and explicit instructions contained in AB12. In short his view was that the retainer arose by implication from the conduct of the parties showing that a relationship of solicitor and client had in fact been established.

Mr. Humphrey Ball for the appellants argued on the premise that AB12 was an ordinary standard letter stating what the appellants as solicitors for the Developers were going to do and it merely informed the respondents what the appellants would procure to be done by the Purchaser and the Developers pointing out the obligations of the two as stated at Clause 5 of the agreement. The loan he submitted, advanced by the respondent was in pursuance of the agreement and not under AB12. Further, there was no evidence of any specific instructions by the respondents that the appellants were to act for them in the preparation and completion of the agreement and thereafter to protect their interests through implementations of the agreement. Since the appellants acted for the Developers, they could not have accepted such instructions. As regards AB23, he submitted that it merely stated the conditions of the loan to the Purchaser and raised no inference that the appellants were receiving the information as solicitors for the respondents in the absence of any words operating to that effect. It was a result of information in AB23 that the appellants drafted the memorandum of charge and served on the respondents.

Mr. Thomas for the respondents conceded that the first paragraph of AB12 was an ordinary letter but not para. 2 which clearly showed the appellants offering their services as stated therein. As admitted by Datuk Stephen Yong in his testimony, the draft charge was prepared acting on AB23 which draft was sent to Mr. Shim of the respondents who denied however, having received it. He also pointed out that prior to the event, there had been relationship between the respondents and the appellants who were responsible for preparing the Articles of Association for bringing the respondents into being and also signed the Articles as witness in September 1965 as "K.T. Yong, Advocate, Kuching." On numerous occasions during 1966, 1967 and 1968 the appellants sent bills and receipts relating to other transactions to the respondents who made payments by way of the appellants' professional charges and loans to borrowers. (See pp. 269 to 285). He disagreed that the appellants acted only for the Developers in relation to the said land but also for the respondents and Bian Chiang Bank (B.C. Bank).

In our view, there was ample evidence on record for the learned Judge to conclude that a retainer came into existence by implication and as amplified by the conduct of the parties which showed a course of dealings giving rise to legal obligations and establishing the relationship of solicitor and client. (*Midland Bank Trust Co. Ltd. v. Hett, Stubbs & Kemp* [1978] 3 All ER 571). AB12 was a follow-up of the agreement indicating what the appellants had undertaken to do with the ultimate purpose of ensuring security for the loan advanced by the respondents. The contents of AB23 were in fact clear and specific instructions requiring the appellants to prepare a charge and to lodge a caveat on the said land.

Acting in the belief that their interests would be served, the respondents made progress payments towards the loan by releasing the money from time to time to the Developers' bankers. By 3 May 1967 the fifth and sixth payments amounting to RM12,900 for the credit of the Developers was duly acknowledged by B.C. Bank. (See p. 218 of the record). The construction of the house had by then been fully completed (see p. 216 of the record) and the Purchaser was subsequently given possession thereof. Only the last and final payment was still left to be made pursuant to the schedule to the agreement. (See p. 203 of the record).

The question of legal fees was not brought up as an issue. We think it is because of the already established relationship between the appellants and the respondents as pointed out earlier by Mr. Thomas of the payments of legal fees by the latter to the former relating to other transactions in the course of the previous years. Clause 11 of the agreement makes payment of "other legal expenses relating to the transfer of the said land to be borne equally between the Developers and the Purchaser." It is therefore safe and reasonable to infer that the fees for the discharge and the intended charge of the said land to B.C. Bank in favour of the respondents would be borne by the respondents and payment of which would be made after the appellants had submitted their bill.

We agree with the learned Judge that there was therefore a retainer which put into operation the normal terms of the contractual relationship including in particular the duty of the appellants as solicitors to protect the interests of the respondents as their clients in matters to which the retainer relates by all proper means. (*Groom v. Crocker* [1938] 2 All ER 394, 413).

Their obligations as expressed in AB12 and AB23 were to obtain certificates to title for the said land, thereafter to prepare a memorandum of transfer and have it duly executed by the Developers in favour of the Purchaser, to prepare a memorandum of charge to be executed

by the Purchaser in favour of the respondents as the Financier and have it presented and registered in order to secure the loan, and to lodge a caveat on the said land on behalf of the respondents for the duration of the loan.

***The contractual duty of the appellants as common solicitor***

It is common ground that the said land was charged among other lots by the Developers to B.C. Bank and the appellants also acted as solicitor for the Developers. The following factors are worthy of note:

(1) According to Clause 5 of the agreement the respondents as the Financier undertook to secure the discharge of the existing charge of the said land to enable a memorandum of charge to be prepared in their favour as security for the Penghulu's loan. This in our view is condition precedent to the appellants having to fulfil their obligations in the retainer.

(2) Nevertheless in order to make the discharge possible the appellants had to obtain the documents of title to the said land as solicitor for the Developers. The condition at (1) above is therefore dependent on (2).

(3) The proviso to Clause 5 of the agreement provides that all the moneys payable under the schedule of payment shall be paid to B.C. Bank as creditors of the Developers, although the bank was not a party to the agreement. That is because the Developers still owed the bank from their overdraft facilities. This fact is within the knowledge of both the Developers and the appellants. It appeared in the circumstances that the respondents' obligation to secure the discharge would be subject to B.C. Bank agreeing to release the monies paid into the Developers' account according to the schedule of payment for the purpose of the discharge of the said land.

What transpired after the issue and registration of the documents of title on 20 July 1967 was the execution of the second charge in favour of B.C. Bank by the Developers on 25 August 1967 to secure the advance of RM440,000 and the said land instead of being retained in spite of the issue of the documents of title was further encumbered. The appellants were instrumental in preparing the said charge on behalf of the Developers. No doubt the charge was made possible by the approval of B.C. Bank. That is because the bank had to look after its own interests and its officers had to follow the banking laws and regulations in order to keep the transactions and accounts of their clients in confidence. In our view, it was the appellants' duty to inform the respondents of the issue of documents of title, the duty being incidental to the retainer. After the execution of the second charge there was still time to do so since the documents of title were in the custody of B.C. Bank which would not release them until the discharge was executed.

The principle applicable in a case of this nature as rightly applied by the learned Judge is that while the duty of a solicitor is directly related to the confines of the retainer, it is the incident of that contractual duty that he has to consult his client on all questions of doubt which do not fall within the express or implied discretion left him. It is also his duty to keep his client informed to such extent as may be necessary according to the same criteria. (*Midland Bank Trust and Groom v. Crocker* (*supra*)) The appellants had therefore failed to comply with the contractual duty as the respondents' solicitor to inform them of the issue and registration of the documents of title to the said land to enable the respondents to secure the discharge of the Developers' charge with B.C. Bank in accordance with the agreement.

***Conflict of interests***

The appellants however did not stop there. The evidence disclosed that they were instrumental in preparing a memorandum of discharge of all the lots including the said land after the Developers had settled their overdrafts with B.C. Bank in full. They were also responsible for preparing the memorandum of charges of the same lots with H.H. Bank to raise the required amount to pay off B.C. Bank and subsequently to execute a second charge. Later on when the Developers received a letter from the respondent's solicitors demanding for the execution of the memorandum of transfer of the said land, the appellants were naturally unable to do so for obvious reason. Still the respondents were not informed of the charges by the Developers with H.H. Bank until a writ was filed by the respondents and the Purchaser against the Developers and after protracted correspondence between them. Finally the respondents were deprived of the opportunity of securing their loan which they had advanced to the Purchaser when the said land with other lots were put up for auction sale by H.H. Bank after the Developers had defaulted under the charges.

It is apparent therefore that the appellants had acted in favour of the Developers whose instructions directly conflicted with those of the respondents. Being a common solicitor for two different clients whose interests were directly in conflict, the appellants acted at their own peril and the onus of showing that the conflicting interests did not prevent them from doing their duty to both clients rested firmly on them. As stated by Danckwerts LJ in *Smith v. Mansel* [1962] 3 All ER 857 at pp. 859 and 860:

> This is a shocking example of the trouble and expense which can arise from the employment (under a mistaken idea of saving time and expense) by the two parties to a sale of a solicitor who is already a solicitor to one of the parties.
>
> The defendant vendor was a builder, whose regular solicitor in his transactions was the solicitor so employed. It seems to me impossible for a solicitor in such circumstances to act fairly for both the parties. The plaintiff purchaser was obviously inexperienced in the matter of buying and selling land. The position in the present case was aggravated by the mistaken idea of the solicitor in question that it was legally possible for the process of "exchanging contracts" between two solicitors acting for the respective parties to be applied to a single document prepared by the only solicitor ... . I think in the present case the common solicitor paid undue attention to the directions which he received from his regular client (I am sure without any conscious bias), and the result is that the unfortunate purchaser found himself without the house which he thought that he was buying, and the vendor was left free to sell the house at an advanced price - if the decision of the learned Judge was right.

In the present appeal, the appellants as common solicitor having acted under the directions received from the Developers resulted in the respondents finding themselves without any security for the RM70,000 loan they had advanced to the Purchaser who was allowed to take possession and occupy the house constructed by the Developers at the expense of the respondents.

It should be noted that the practice of having a common solicitor acting for both parties although legitimate and is recognised by the order governing non-contentious remuneration, has inherent dangers in it as illustrated in *Goody v. Baring* [1956] 2 All ER 11 and *Moody v. Cox* [1916-17] All ER Rep. 548.

Turning to the present appeal, we agree with the learned Judge that the appellants being that invidious position and on discovering that they were unable to properly discharge their duties fairly should have inquired of the respondents whether their obligation to prepare the memorandum of charge was superseded or had come to an end. That they failed to do.

The learned Judge said on p. 178:

> In this case the defendants chose not to clarify any doubts that they may have had as to whether their instructions to charge the two lots were superseded by the fact that the two lots were still subject to a charge to the Bank which had common officers with the plaintiffs' corporation and a final payment of RM3,100 was still outstanding; and that before 23 September 1967, the Bank proceeded to obtain a further charge over these two titles, nor did they ascertain whether their instructions had come to an end. They just assumed it had. Nor did they bring to the notice of the plaintiffs the fact that the land to be subsequently charged to Hock Hua Bank was the same land which they had undertaken to charge to the plaintiff's as security for the loan given to the purchaser by the plaintiffs.

***Liability in tort***

The liability of a solicitor may be viewed in two aspects. At common law the retainer imposes upon him an obligation to be skillful and careful and for failure to fulfill this obligation he may be made liable in contract for negligence whether he is acting for reward or gratuitously. On the other hand, like any other individual, a solicitor is liable for his wrongful acts and if the circumstances justify the charge, he may be made liable to his client in tort. (See *Halsbury's Laws of England*, 3rd Edn. Vol. 36 p. 96, para. 131). He owes a duty not to injure his client by failing to do that which he had undertaken to do and which his client has relied on him to do. (*Midland Bank Trust Co. Ltd.* (*supra*)). Applying this principle, we are satisfied from the evidence on record, that the learned Judge was justified in concluding that the appellants had not only failed to perform their obligations under the contract with the required skill and care but were also liable in tort for their wrongful act of depriving the respondents from having security for the loan they have advanced by failing to execute a memorandum of charge.

***Knowledge of common officers***

We now turn to the question whether knowledge of the common officers of one company can be imputed to the other company. It was the appellants' contention that because PW1 was the managing director of B.C. Bank and also the chairman of the respondents and PW6 was the secretary of the former as well as the latter, all knowledge and information acquired by B.C. Bank must be imputed to the knowledge of the respondents. It was also submitted that PW1 by his office and financial interest, controlled both the respondents and the Bank as a managing director could not be allowed to escape responsibility by merely denying knowledge.

The principle in this regard is that knowledge acquired by the officer of one company will not be imputed to the other company unless the common officer had some duty imposed upon him to communicate the knowledge of the other company, and had some duty imposed on him by the company which is alleged to be affected by the notice to receive the notice. (*In re Hampshire Land Company* [1896] 2 Ch 743, 748).

In that case the dispute was between two companies one giving a loan to the other to the knowledge of the common secretary whose duty was to affect notice sought by the company who employed him and to receive that notice as the secretary of the other company. In *Gale v. Lewis* 9 QB 730, the jury found as a fact that the common agent was authorised by the companies to affect and to receive such notice. Similar cases are found in *In re Marseilles Extension Railway Company* [1871-72] Law Reports 161 and *In re David Payne & Co. Ltd.* [1904] 2 Chancery 608. The question of imputed knowledge of the common officers in these cases arose during the winding-up of the companies. It was applied except in cases where

the common agent was found to be guilty of fraud, illegality or inducement for the purpose outside the scope of the borrowing company, then his knowledge of the transaction could not be imputed to the other company which had advanced the loan.

In the present appeal we think the Judge was right in holding that the principle did not apply. Both PW1 and PW6 might be common officers of the respondents and B.C. Bank and had knowledge of the agreement but the loan advanced by the respondents was to a third party i.e., the Purchaser and the money was paid to B.C. Bank in the account of the Developers pursuant to the housing agreement. There was no evidence to show any loan transaction between the respondents and B.C. Bank. In fact the latter gave overdraft facilities to the Developers. Secondly there was no evidence that PW1 and PW6 had some duty imposed upon them to communicate their knowledge from B.C. Bank relating to the Developers' overdraft account to the respondents even though the security for such included the charge of the said land among other lots. On the contrary the bank has laws and regulations to be followed in order to keep confidential their clients' accounts. The mere fact of the two companies having common directors does not affect each company by everything that is done in the other. (*In re European Bank* Law Reports, 5 Ch 358).

Another point raised was that PW1 as chairman and the managing director of the respondents and as the managing director of B.C. Bank and the *alter ego* of the companies had access to and was in fact controlling the affairs of the two companies. It was suggested that in such capacities which are united in one person he could have arranged for the discharge of the two lots comprising the said land. Reliance was made on *Lennards Carrying Co. v. Asiatic Petrol Co.* [1914-15] All ER Rep. 280. Firstly the issue which arose in that case relates to the construction of s. 502 of the Merchant Shipping Act, 1894 which states *inter alia* that the owner of a British sea-going ship is not liable to make good any extent whatever "any loss or damage happening without his actual fact or privity where any goods are lost or damaged by fire on board the ship.

Secondly the principle laid down is that where the active director of the appellant company which owned a ship also took an active part in the management of another company which managed the ship in which he was entrusted and had his name registered in the ship's register, his knowledge of the defects which manifested themselves in the condition of the ship amounting to unseaworthiness coupled with him being the directing mind and will of the appellant company, rendered his action to be the action of the company itself under s. 502. As a result the company was liable in damages for the cargo belonging to the respondent being destroyed by fire when the ship became stranded in a gale and caught fire due to the bad condition of its boilers. He cannot successfully deny knowledge or excuse himself for not having known of the defects.

We do not think the principle applies to the instant case. The facts in the above case are not similar while the evidence in the present case is insufficient to justify the notion that PW1 is the *alter ego* of B.C. Bank or the respondents. Similarly the contention that his knowledge of the bank's transactions with regard to the said land can be imputed to the knowledge of the respondents so that his action in the former was the action of the latter cannot in the circumstances be accepted.

***Fraudulent concealment***

From the facts it was the learned Judge's findings that when the documents of title in respect of the said land were sent to the appellants by B.C. Bank on 26 June 1968 (Exh. D2) the appellants were instrumental in charging the said land to H.H. Bank on 4 July 1968 (AB36-38) without informing the respondents. It was not until 30 November 1974 that the respondents came to know about it from a letter sent by Ong Tiaw Kok to Ibrahim & Co. (AB61). The appellants did not inform the respondents of the dealings until 13 December 1975 (AB66) after an inquiry by the respondents' then solicitors. The learned Judge had this to say:

> On the facts and contrary to their obligations the defendants had not done anything to execute the memorandum of charge in favour of the plaintiffs on the documents of title of the two lots of lands. If they were mindful of their duties, it was their obligation to consult the plaintiffs and keep the plaintiffs informed on all matters relating to the charge. Yet they made no effort and instead surreptitiously charged the two lots to Hock Hua Bank. This, in my opinion, amounted to fraudulent concealment of the cause of action by the defendants by keeping the plaintiffs in ignorance of the wrong they had committed in charging the two lots of the lands to a third party. This was an unconscionable conduct on their part ... .

In our view, fraud in this case is not limited to the common law fraud in which the action being one of deceit and it is necessary to prove actual fraud by showing that the false representation has been made knowingly or without belief in its truth or recklessly without caring whether it is true or false. (*Nockton v. Ashburton* [1914] AC 933 at 946). It relates to "fraud" as stated in s. 18 of the Limitation Ordinance (Cap. 49). It extends to equitable or constructive fraud in which the concealment does not involve any dishonesty and no degree of moral turpitude is necessary to establish fraud within the section. The phrase covers conduct which having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. (*Kitchen v. R.A.F. Assocn. & Ors.* [1958] 2 All ER 241 at 249 and *Beaman v. A.R.T.S.* [1949] 1 All ER 465).

It is clear therefore as stated by the learned Judge that the appellants not only neglected to notify the respondents of the charge of the said land to H.H. Bank until more than five years later but were also instrumental in placing the securities out of the respondent's reach. We agree with respect with the Judge that there was fraudulent concealment of the right of action on the part of the appellants.

***Limitation period***

Section 18 of the Limitation Ordinance (Sarawak) states as follows:

> 18. When any person having a right to institute a suit has, by means of fraud, been kept from the knowledge of such right of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit-
>
> (a) against the person guilty of the fraud or accessory thereto; or
>
> (b) against any person claiming through him otherwise than in good faith and for a valuable consideration.
>
> shall be computed from the time when the fraud first became known to the person injuriously affected thereby or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

Section 18 is in *pari materia* with s. 18 of the Indian Lamition Act 1980 prior to the amendment in 1963 by the new s. 17 of the Indian Limitation Act 1963 which is recast on the lines of s. 26 of the Limitation Act 1939 of England. It says that the period of limitation prescribed by the Act does not begin to run in certain cases of fraud until the plaintiff has discovered the fraud **or could with reasonable diligence have discovered it**. (Emphasis is Mine). The words emphasised or words to the effect do not appear in s. 18 of our Limitation Ordinance. As in the relevant section of 1908 Indian Act, s. 18 of our Ordinance says that where a person is kept from the knowledge of the fraud of another person, limitation is computed from the time when the fraud first became known to the person injuriously affected thereby. The difference in the language is significant in that mere suspicion or hearsay knowledge is not enough. There is no requirement to put a prudent man or diligent man into enquiry as is required in the new Indian or the English Act on which the former is modelled. (See *B.B. Mitra on Limitation Act*, (1963) 17th Edn. p. 215). The requirement has therefore no application in Sarawak.

The limitation period under item 76 of the Schedule to the Ordinance is three years computed from the time when the fraud became known to the party wronged. We agree with the learned Judge that the respondents discovered the fraud on 30 November 1974 according to the facts disclosed. They filed the writ on 29 September 1977 i.e., within the three year limit from the time of discovery. The respondents were well within time and are therefore not barred by limitation.

It was submitted that s. 18 refers to a person and not a firm and since fraud is personal to an individual the appellants cannot seek protection under the section. We are satisfied that although the appellants are a firm of solicitors the claim was directed against all the three partners for whom appearance was entered on 13 October 1977 naming the individual partners of the company as the defendants therein. That is in line with O. 48A r. 5 of RSC (0. 77 r. 4 of RHC, 1980) which requires appearance to be made in the names of the partners but the action shall continue in the name of the firm. Since the names of the partners are specified it is competent to sue a firm for damages on ground of fraud. (*Thomson & Co. v. Pattison Elder & Co*, [1895] 22 R (Ct. of Sess.) 432). In the light of the above, we are of the view that each and every one of the three individual partners fall within the ambit of the word "person" in s. 18.

Further it was contended the allegation of concealed fraud is not properly pleaded and not particularised in the statement of claim but only in the amended reply (p. 30 of the record). In this regard we refer to *Halsbury's Laws of England* 4th Edn. Vol. 28 p. 295 para. 655 which says that where concealed fraud or mistake is relied upon as postponing the limitation period, it must be sufficiently alleged in the pleading to bring the case within the appropriate statutory provision. Where only the remedy would have been barred the plea of concealed fraud not discovered may be alleged either in the statement of claim or reply but where the remedy as well as the title are barred it is part of the cause of action to be alleged in the statement of claim. The claim in the instant appeal is not based on fraud (see p. 12 of the record) but only the remedy sought is based on concealed fraud. It is therefore sufficient to allege the plea and give the particulars in the reply so as to bring the case within the statutory provision of s. 18.

***Damages***

There was no serious argument on the quantum of damages. The respondents' loss was purely financial. They had lost the security for the loan that they had advanced and were unable to recover it due to the appellants' breach of retainer and negligence. As for the

authority that a claim for purely financial loss without injury to the person or property is no bar to liability for negligence we refer, as did the learned Judge, to *Ross v. Caunters (a firm)* [1979] 3 All ER 580, with which we agree.

We hereby confirm the judgment of the learned Judge and the award of damages stated therein with interest and costs to be taxed.

The appeal is hereby dismissed with costs. The deposit should be paid to the respondents.

Also found at [1984] 1 CLJ 353